Filed 4/26/12 P. v. Moore CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LEONARD LEE MOORE, Defendant and Appellant.	F063044 (Fresno Super. Ct. No. F10906186) **O P I N I O N**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell and Kristi Culver-Kapetan, Judges.[†]

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Dawson, Acting P.J., Poochigian, J., and Franson, J.

[†] Judge Harrell presided over appellant's *Marsden* hearing. Judge Culver-Kapetan sentenced appellant.

On April 28, 2011,[1] appellant, Leonard Lee Moore, pursuant to a plea agreement, pled no contest to infliction of corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)), and admitted enhancement allegations that he had served three separate prison terms for prior felony convictions (Pen. Code, § 667.5, subd. (b)).

On July 7, appellant filed a notice of motion to withdraw his plea. On July 22, the court, following a hearing, denied the motion and immediately thereafter, pursuant to the plea agreement, dismissed two prior prison term enhancements and imposed the agreed upon prison term of four years, consisting of the three-year midterm and one year on the remaining prior prison term enhancement. On August 10, the court granted appellant's request for a certificate of probable cause (§ 1237.5).

On appeal, appellant's sole contention is that the court erred in denying his motion to withdraw his plea. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Facts

On December 7, 2010, Nadia Smith was at her residence with appellant, her boyfriend at the time, when the two began arguing and Smith told appellant to leave.[2] Over the course of about one year preceding December 7, 2010, appellant had spent the night with Smith at her home approximately 10 nights per month. As the argument continued, appellant refused to leave and struck Smith in the face with a closed fist, knocking her to the ground. While she was on the ground, attempting to cover up, appellant struck her four or five more times.

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[1] Except as otherwise indicated, all references to dates of events are to dates in 2011.

[2] Our factual statement is taken from Smith's testimony at the preliminary hearing on January 19.

When he stopped, Smith got up. She could "feel the blood just coming down [her] face." Appellant said he was sorry but complained that Smith "made [him] mad" because she "did something, lying...." Appellant left the house and Smith called 911. Smith suffered a bruise to her cheek, a bloody nose, a split upper lip, and an injury to her left eye.

Procedural Background

On April 21, the court appointed conflict counsel Mark Asami to represent appellant, after the Fresno County Public Defender declared a conflict of interest. On April 25, at a trial confirmation hearing (TC hearing), the court vacated the previously set trial date of May 2, continued the TC hearing to April 28, and set May 10 as a tentative trial date.

On April 28, appellant appeared in court with Asami, before Judge Kristi Culver-Kapetan. Asami noted that the court had "indicated [five] years," and stated that appellant proposed a "counter-offer" of four years. The court stated it would "reject" the counteroffer, set a TC hearing for May 5, and confirmed May 10 as the trial date. Shortly thereafter the court recessed, and when the court reconvened, the prosecutor informed the court that the victim was agreeable to "the 4 year counter-offer." The court stated that under those circumstances, it would agree to a four-year sentence. Next, appellant, in response to the court's questions, affirmed that he had completed a change of plea form and that he had gone over the form with his attorney. Thereafter, the court took appellant's plea, and set sentencing for May 25. Sentencing was subsequently continued to June 29, and again to June 30.

In the change of plea form, executed on April 28, appellant indicated, inter alia, that he had "had enough time to discuss [his] case and all possible defenses with [his] attorney," and that he was "entering into [his] plea freely and voluntarily."

On June 30, appellant appeared with Asami before Judge Arlan L. Harrell at which time Asami informed the court that appellant wished to move for an order for the appointment of substitute counsel. At the *Marsden* hearing,[3] that then ensued, appellant, in response to the court's request that appellant state why he wanted substitute counsel appointed, told the court the following: After Asami was appointed, he told appellant, "'I'm not ready to go to trial just yet. I have to look up your case.'" Appellant asked Asami to "look up some evidence," including one or more photographs of "[appellant's] clothing and things like that." Asami, however, "was giving [appellant] the runaround." Appellant asked Asami "where were the photos," and Asami "said they were sitting in Mr. Feinberg's [the deputy public defender who had been representing appellant] living room." Asami "didn't look up the evidence [appellant] asked him to look up." This discussion occurred at some point prior to the entry of appellant's plea.

Asami told the court the following: He met with appellant at the jail, prior to the April 25 TC hearing, and again at the hearing. Appellant asked Asami to "retrieve" certain photographs of the complaining witness and the clothing appellant was wearing when he was arrested. He spoke to Feinberg about the photograph of the complaining witness, but Feinberg had "left it in his living room." Feinberg later brought the photograph to his office, where Asami picked it up, but prior to that appellant entered his plea. Asami "did not get the other [photographs]" at that time.

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3 In *People v. Marsden* (1970) 2 Cal.3d 118, the California Supreme Court held that when a criminal defendant requests a new appointed attorney, a trial court must conduct a proceeding in which it gives the defendant an opportunity to explain the basis for the contention that counsel is not providing adequate representation. (*Id*. at pp. 123-125.) A motion for the appointment of substitute counsel on the ground that the current appointed counsel is providing inadequate representation, and the hearing on that motion, are commonly called, respectively, a *Marsden* motion and a *Marsden* hearing.

Asami further explained: "... as far as trial, I was prepared to get those [photographs], if I could, but I didn't have to because [appellant] settled the case." Asami did not obtain the "booking photos" until the previous day's scheduled sentencing hearing. Those photographs showed "there was no blood, essentially."

In further discussions, appellant complained that prior to entering his plea, Asami "ha[d] not even seen the pictures." Appellant asserted: "That means [Asami was] not working on my behalf, as far as, okay, let me see these pictures before he enters this plea and see if we're going to go to trial."

The court noted that appellant knew what the photographs depicted, yet nonetheless "engaged in [plea] negotiations and conversations with the Court," and, according to the court's understanding, "made an offer to the judge." Appellant responded, "This is because of the fact that Mr. Asami had not seen the pictures...."

Appellant also told the court he had been in jail, waiting to go to trial, for "going on seven months," he was "ready to go to trial," and, he stated, "This is what I want, someone to represent me as in with my evidence and everything that is being placed on the table, Your Honor. This is the reason why I was ready to take the deal, because I'm tired of sitting here, Your Honor."

Judge Harrell denied appellant's *Marsden* motion. Shortly thereafter, back in open court, after the court stated that it was ready to proceed with sentencing, Asami told the court, and appellant confirmed, that appellant "still wants to withdraw his plea." The court asked Asami if there was "any basis" upon which to base a motion to withdraw appellant's plea. Asami told the court he was "unaware of any reason for him to withdraw his plea." The court asked appellant if he would "like some additional time to try to come up with a basis," and appellant stated he did not need additional time and that he wanted to go to trial. The court told appellant that his no contest plea "is treated the same as a guilty plea," and appellant responded: "Yes, I understand that now. But at that

time, I did not know that. And as I stated earlier in court, counsel had not seen the pictures yet. And on his advice, that is the reason why I took the time."

After some further discussion, the court told appellant he had a right to be sentenced by the judge who took his plea, and set sentencing for July 6.

When appellant next appeared in court, before Judge Culver-Kapetan, on July 6, Asami again indicated to the court that appellant wanted to withdraw his plea. There followed a discussion, at the conclusion of which the court ruled that it would not entertain such a motion if the basis for the motion was the ineffective-assistance-of-counsel claim previously ruled on at the *Marsden* hearing. At that point, appellant stated, he "would like to file a Faretta motion," i.e., a motion that he be allowed to represent himself.[4] He also stated again, "I want to take my plea back." The court continued the hearing to the following day to allow appellant to make a *Faretta* motion.

The next day, July 7, Judge Culver-Kapetan granted appellant's *Faretta* motion. Also on that date, appellant filed a notice of motion to withdraw his plea, and a supporting declaration and memorandum of points and authorities. The court set a hearing on the motion for July 22.

In his declaration supporting his notice of motion, appellant stated: "The facts constituting good cause for withdrawal of my plea, such as ineffective representation of counsel, fraudulently induced plea, failure to advise of direct consequences of the plea, or the prosecutor's suppression of favorable evidence." (*Sic*.)

At the outset of the hearing, appellant submitted to the court a photograph—not described in the record—and stated he also had other photographs which showed there was no blood on the clothing he was wearing when he was arrested, and suggested these

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[4] See *Faretta v. California* (1975) 422 U.S. 806.

photographs refuted Smith's claim that she was bleeding and had blood all over her clothing.

At that point, Judge Culver-Kapetan referred to the transcript of the April 28 proceeding and stated, "you could have proceeded to trial at that time, you [chose] not to." Appellant responded:

"My lawyer. Because at the time he did not have this evidence, that's why he chose to proceed. And I kept telling [Asami], your Honor, please go get the evidence.... I kept asking him, he kept telling me -- he kept putting it off. 'Why are you putting it off? All you have to do is talk to Mr. Feinberg and go get the evidence.' He tells me Mr. Feinberg has the evidence at his home. Well, if you're a lawyer, you need to go get that evidence. He doesn't go get these pictures that were taken until May 31st, which is another 30 days, until June 29th, ... and he's putting it over, he's putting it off.

"I asked him, 'Why are you putting it off? Why aren't you doing what I ask you to do? All you have to do is get the pictures. Just go get the pictures.' He doesn't do that until the day of sentencing, your Honor. Then he tells me, 'Here are the photographs.' And I said, 'So what are we going to do about this?' He tells me, 'I don't know what we're going to do.' I said, 'You're my counsel, you're my lawyer, tell me what we should do about this situation.' 'Well, you already signed a deal.' I said, 'Well, I would like to take the deal back and go to trial.' He tells me, 'Well, I don't think you're going to be able to take the deal back.' I said, 'Are there some motions we can file? Judge Harrell said there are some motions you can file to take your plea back.' And that's why I requested to appear in pro per."

After further discussion, the court denied appellant's plea motion. Shortly thereafter, appellant asked the court to appoint counsel to represent him at sentencing. The court took a recess, and when court reconvened, the court appointed counsel and proceeded with the sentencing.

DISCUSSION

Appellant argues that prior to entering his plea, there existed, and appellant was aware of, photographs taken around the time of the alleged offense—of the complaining witness and appellant's clothing—which would have or could have cast doubt on the complaining witness's version of events, and were therefore crucial to appellant's defense. At some point between April 21, when Asami was appointed as appellant's trial counsel, and April 28, when appellant entered his plea, appellant told Asami about the photographs and asked Asami to obtain them so that they could be presented as evidence at trial. However, as of April 28, Asami was not in possession of the photographs. Appellant asserts that because Asami did not have the photographs at that time, appellant believed Asami would be unprepared for trial, which was set for May 10, and that his plea was involuntary because it was "induced" by this belief. Therefore, appellant argues, the court abused its discretion in denying his motion to withdraw his plea. We disagree.

Governing Legal Principles

"[Penal Code] [s]ection 1018 permits a trial court to allow a criminal defendant to withdraw his guilty plea 'for a good cause shown.'" (*People v. Wharton* (1991) 53 Cal.3d 522, 585 (*Wharton*).) "Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea." (*People v. Cruz* (1974) 12 Cal.3d 562, 566.) "It is the defendant's burden to produce evidence of good cause by clear and convincing evidence." (*Wharton*, at p. 585.) "Penal Code section 1018 ... requires liberal construction of its provisions to promote justice. However, the promotion of justice includes a consideration of the rights of the prosecution, which is entitled not to have a guilty plea withdrawn without good cause." (*People v. Hightower* (1990) 224 Cal.App.3d 923, 928 (*Hightower*).)

"'[T]he withdrawal of a plea [of guilty or no contest] is within the sound discretion of the trial court after due consideration of the factors necessary to bring about a just result.'" (*Hightower, supra*, 224 Cal.App.3d at p. 928.) "'An appellate court will not disturb the denial of a motion [to withdraw a plea] unless the abuse is clearly demonstrated.'" (*Wharton, supra*, 53 Cal.3d at p. 585.) "[I]n determining the facts [with respect to a claim that a defendant did not understand his or her plea or its consequences], the trial court is not bound by uncontradicted statements of the defendant." (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103.) Further, "the trial court ... is the trier of fact and hence the judge of the credibility of the witnesses or affiants. Consequently, it must resolve conflicting factual questions and draw the resulting inferences. [Citation.] As is the case with most other evidentiary rulings by a trial court, we apply the substantial evidence rule on appellate review. [Citation.] Under this rule, we 'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Quesada* (1991) 230 Cal.App.3d 525, 533; accord, *Hunt*, at p. 104 [in plea withdrawal proceeding, "[w]here two conflicting inferences may be drawn from the evidence, it is the reviewing court's duty to adopt the one supporting the challenged order"].)

Analysis

As indicated above, appellant claims he entered his plea only because he believed his attorney was unprepared for the trial that was scheduled to begin 12 days hence. However, an examination of the record reveals that at no point in the proceedings below did appellant make, and nothing in the record supports, this claim. In his declaration in support of his motion to withdraw his plea, he states, without elaboration or factual support, that his motion was based, in part, on "ineffective representation of counsel." Similarly, at the hearing on the motion, although he reiterated his dissatisfaction with his

counsel's performance, which he had previously expressed at the *Marsden* hearing—specifically, his dissatisfaction with Asami's failure to obtain, as of April 28, photographs appellant believed were crucial to his defense—he did not state that he was concerned that Asami would be unprepared to proceed when trial began on May 10. When the court asserted that appellant "chose" to enter his plea on April 28, when trial was still 12 days off, appellant responded, "Because my lawyer," and again stated his complaint that Asami had not obtained, or even seen, the photographs appellant believed would aid his cause. However, at no point did appellant tell the court, at either the hearing on the motion to withdraw or in his moving papers—or even at his *Marsden* hearing—that, as he now claims, he entered his plea because he believed the plea agreement was the best he could hope for in light of Asami's purported lack of preparedness.

Moreover, even if appellant's statements in court and in his declaration reasonably could be construed as conveying the claim that his plea was induced by his belief that Asami would not be ready for trial, the trial court reasonably could have concluded that appellant had not presented clear and convincing evidence to support that claim. Appellant affirmed, under penalty of perjury, in his change of plea form that he was entering his no contest plea voluntarily. Under the principles summarized above, the court was not compelled to credit uncorroborated subsequent statements to the contrary.

Appellant likens his case to *People v. Ramirez* (2006) 141 Cal.App.4th 1501 (*Ramirez*). In that case, *after* the defendant, pursuant to a plea agreement, pled no contest to two felony counts, his counsel learned of a previously undisclosed police report that "contained evidence that might have supported ... possible defenses ...." (*Id.* at p. 1507.) The defendant moved to withdraw his plea, asserting that he entered his plea based on the mistaken belief that there was "'no favorable evidence in [his] case....'" (*Ibid.*) In addition, his counsel stated in a declaration filed in support of the motion that the newly discovered report would have affected his evaluation of the case and "'altered [his]

advice to [the defendant] regarding whether he should accept the plea bargain agreement.'" (*Ibid*.) The trial court denied the motion, and the appellate court reversed, holding that the defendant "ha[d] established by clear and convincing evidence that the prosecution's withholding of favorable evidence affected [the defendant's] judgment in entering his plea, rendering the waiver of rights involuntary." (*Id*. at pp. 1507-1508.) The court noted "'"it has been held that the least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient cause to permit a change of plea from guilty to not guilty."'" (*Id*. at p. 1507.)

However, appellant, unlike the defendant in *Ramirez*, did not enter his plea at a time when he was unaware of evidence that would have affected his decision to accept a plea agreement. Appellant makes no claim, and there is no indication in the record, that appellant was not aware of potentially favorable evidence at the time he entered his plea. To the contrary, appellant told the court—and was upset precisely because—he was aware of certain photographs he considered vital to his defense. Moreover, in *Ramirez*, the factor affecting the defendant's judgment—his late discovery of favorable evidence—was undisputed. Here, by contrast, the factor purportedly affecting appellant's judgment—his claimed belief that counsel would not be prepared at the time of trial—is, as demonstrated above, not clearly established. *Ramirez* is inapposite.

As demonstrated above, the court reasonably could conclude appellant's plea was voluntary. Therefore, appellant has not demonstrated the court abused its discretion in denying his withdrawal of plea motion.

DISPOSITION

The judgment is affirmed.